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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

ALEXANDER NIKOLAYCHUK,

Plaintiff and Appellant,

v.

CAPITAL ONE, NA et al.,

Defendants and Respondents.

B303760

(Los Angeles County
Super. Ct. No.BC698251)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Law Office of Terrence J. Mix and Terrence J. Mix for
Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton for Defendants and
Respondents.

INTRODUCTION

In 2011, defendant and respondent Integrated Loan Services, Inc. (Integrated) held a nonjudicial foreclosure sale of real property that secured a deed of trust on which plaintiff and appellant Alexander Nikolaychuk had defaulted. Plaintiff's lender, ING, the predecessor in interest of defendant and respondent Capital One, N.A., purchased the property with a full credit bid of \$1,060,642.44. In early 2012, ING issued a federal tax form, Form 1099-C, reporting to the Internal Revenue Service (IRS) that it had cancelled \$688,750.00 in debt plaintiff owed on a recourse loan during the 2011 tax year. Plaintiff did not receive his copy of the Form 1099-C and did not file a 2011 tax return.

In 2015, plaintiff learned that the IRS was attempting to collect from him approximately \$372,000 in overdue federal income taxes and penalties, based on the cancellation of debt ING reported on the Form 1099-C. Plaintiff alleged that he suffered emotional distress. Plaintiff subsequently filed a 2011 tax return showing he owed no taxes, and the IRS ceased its collection efforts against him in 2017. Plaintiff asserted that his emotional distress abated at that time.

Plaintiff sued Integrated and Capital One in 2018. He alleged that Integrated negligently breached its trustee duties by failing to inform him the debt had been paid and provide him with a copy of the cancelled promissory note. Plaintiff alleged that Capital One's predecessor in interest, ING, engaged in fraud and negligently and intentionally inflicted emotional distress on him by furnishing false information on the Form 1099-C.

Defendants moved for summary judgment or adjudication on numerous grounds, including the statute of limitations. The trial court issued a tentative ruling granting summary judgment

on alternative grounds. Essentially, it found that plaintiff could not establish damages because the errors on the Form 1099-C worked in his favor and he had failed to timely file a federal income tax return and report the cancelled debt to the IRS. At the hearing on the motion, the trial court denied plaintiff's request for additional time to address these issues, and adopted the tentative as its ruling.

Plaintiff now contends the court denied him due process of law by denying his request for additional time to address the issues in the tentative ruling. He further contends that the trial court's legal analyses, based primarily on federal tax law, were incorrect. In their joint response, defendants argue that plaintiff was not denied due process and that the court's analyses were correct. They also contend that even if the trial court's reasoning was incorrect, the judgment should be affirmed because the grounds they asserted in their motion for summary judgment compel judgment in their favor as a matter of law. We ordered supplemental briefing pursuant to Code of Civil Procedure section 437c, subdivision (m)(2)¹ to provide the parties with an opportunity to address the theories defendants raised in their summary judgment motion.

We affirm the judgment of the trial court. Plaintiff has not demonstrated prejudice resulting from the denial of his request for additional time, and defendants have shown they are entitled to summary judgment on plaintiff's claims. The causes of action for negligent and intentional infliction of emotional distress and breach of trustee duties are barred by the statute of limitations.

¹All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Plaintiff has not demonstrated a triable issue of material fact as to the fraud cause of action.

FACTUAL BACKGROUND

The following facts are taken from the parties' summary judgment filings and are largely undisputed. Consistent with the standard of review applicable to orders granting summary judgment, we recite the facts in the light most favorable to plaintiff, the nonmoving party. (See *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)

On or about November 1, 2007, plaintiff obtained an \$880,000.00 loan from ING, the repayment of which was secured by a deed of trust recorded against a residential property in Tarzana. The property was severely damaged by a fire in February 2009. Plaintiff did not repair the property and subsequently ceased making payments on the loan.

At some point Integrated was substituted as trustee under the deed of trust. After recording notices of default and trustee's sale, Integrated sold the property at a nonjudicial foreclosure sale on or about May 17, 2011. ING purchased the property with a full credit bid of \$1,060,642.44.² At the time of the sale, the

²As plaintiff's lender, ING was permitted to bid at the nonjudicial foreclosure sale in the capacity of a purchaser. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1238.) Unlike other purchasers, lenders are permitted to make credit rather than cash bids, "to avoid the inefficiency of requiring the lender to tender cash which would only be immediately returned to it." (*Ibid.*) "A 'full credit bid' is a bid 'in an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees, and other expenses of the foreclosure.'" [Citation.] If the full credit bid is successful, i.e., results in

unpaid principal balance on the loan was \$880,000. The land (exclusive of the house) was appraised at \$255,000 approximately two weeks later. ING sold the property to a third party in September 2011 for \$340,000.

In January 2012, ING sent the IRS a Form 1099-C reporting that it had cancelled debt owed by plaintiff on June 30, 2011.³ The Form 1099-C reported that ING cancelled \$688,750.00 in debt⁴, and the fair market value of the property was \$255,000. ING checked a box on the Form 1099-C indicating that plaintiff had been “personally liable” for the repayment of

acquisition of the property, the lender pays the full outstanding balance of the debt and costs of foreclosure to itself and takes title to the security property, releasing the borrower from further obligations under the defaulted note.” (*Ibid.*)

³Per an IRS publication titled “2011 Instructions for Forms 1099-A and 1099-C,” of which the trial court took judicial notice, financial institutions are required to file a Form 1099-C reporting to the IRS cancellation of debt after the occurrence of an “identifiable event,” including “cancellation or extinguishment [of a debt] when the creditor elects foreclosure remedies that by law end or bar the creditor’s right to collect the debt.”

⁴According to declaration testimony submitted by defendants, as well as an admission they made in response to plaintiff’s request for admission, ING calculated \$688,750.00 by subtracting \$191,250 from the \$880,000 in principal outstanding on plaintiff’s loan at the time of the foreclosure sale. ING calculated \$191,250 by “adjusting” the \$255,000 appraisal value of the property downward 25 percent, because “pre-foreclosure property valuations were consistently overvaluing the market value of properties,” and ING often had to incur expenses prior to reselling foreclosed properties. ING admitted during discovery that the \$688,750 “did not represent debt owed by Plaintiff to ING.”

the debt; that is, that the loan was a recourse rather than a nonrecourse loan. During discovery, ING admitted that it knew that plaintiff did not owe any money after the May 17, 2011 foreclosure sale and that plaintiff was “not personally liable to ING on the Loan after the foreclosure sale by virtue of California’s antideficiency laws.” In other words, it knew that the representations it made on the Form 1099-C were inaccurate.

ING mailed a copy of the Form 1099-C to plaintiff at an address in Rancho Palos Verdes. It did not mail a copy to a Los Angeles address that plaintiff asked ING to use in 2010 (plaintiff’s parents’ address). Plaintiff was living in Hawaii at the time and did not receive the Form 1099-C. Plaintiff also did not file a 2011 federal income tax return.

In 2013, plaintiff moved from Hawaii to the Northern Mariana Islands, a U.S. territory. On or about June 24, 2013, the IRS mailed a letter to plaintiff at his parents’ Los Angeles address, informing plaintiff that the IRS had not received his federal income tax return for 2011.⁵ The letter included an attachment in which the IRS “figured your tax and proposed penalties based on the information your employers, banks, and other payers reported on forms W-2, W-2P, 1099, etc.” According to that attachment, plaintiff owed \$227,947.00 in federal income taxes, \$72,896.96 in penalties, and \$10,091.84 in interest, for a total of \$310,935.80. The income on which the IRS calculated the

⁵The letter states that the IRS was “Sending You This Letter” because “You haven’t responded to the previous letter(s) we sent requesting you to send us your federal income tax return (Form 1040, 1040A, or 1040EZ) for the tax period(s) shown above,” 2011. The June 24, 2013 letter is the earliest one mentioned by the parties and included in the appellate record.

taxes due consisted entirely of the cancelled debt reported on the Form 1099-C.

The IRS sent plaintiff a “Notice of Deficiency” at his parents’ address on or about August 26, 2013. The Notice of Deficiency also asserted that plaintiff owed a total of \$310,935.80.

Plaintiff stated during his deposition that he had never seen the June 24, 2013 letter or the Notice of Deficiency. He also “d[id]n’t think” that his parents told him about either document. In a subsequent declaration, he clarified that he saw the documents “only after retaining my attorney” in early 2018.

In September 2015, plaintiff, who was still living in the Northern Mariana Islands, got a phone call from his father. Plaintiff’s father told him “that he had recently learned from the IRS that I owed ‘hundreds of thousands of dollars’ in overdue taxes and interest.” Plaintiff testified that he “began experiencing emotional distress” at this time. “Believing that bankruptcy was his salvation,” plaintiff contacted a bankruptcy firm. On the firm’s recommendation, plaintiff then contacted the IRS and asked the IRS to “send paperwork” to his parents’ address.

In response to plaintiff’s request, the IRS sent a “Reminder of overdue taxes for 2011” to plaintiff at his parents’ Los Angeles address on or about October 5, 2015. According to that document, plaintiff owed \$372,598.44 in taxes, penalties, and interest. Pursuant to a request made on October 14, 2015, the IRS also sent plaintiff a copy of the Form 1099-C. Plaintiff testified that receipt of these documents exacerbated his emotional distress.

Plaintiff filed a bankruptcy petition on November 13, 2015. On or about December 28, 2015, plaintiffs’ bankruptcy attorneys

advised him that “[r]ecent taxes” were “nondischargeable in bankruptcy.”⁶ Plaintiff “panicked” and decided to flee the country to evade the jurisdiction of the IRS. He moved to Lima, Peru in March 2016. The IRS subsequently filed a “Notice of Intent to Levy” his property.

In March 2017, plaintiff “consulted with a CPA [certified public accountant] in the United States and forwarded all [his] tax information to him for an opinion and, if appropriate, a tax return for the year 2011.” On or about March 22, 2017, the CPA informed plaintiff that he did not owe any taxes for 2011 due to an exemption; the CPA prepared and filed a 2011 federal tax return for him. Plaintiff testified that he then felt “a major relief from the stress and pressure [he] had been experiencing.”

On or about July 12, 2017, the IRS recorded a “Certificate of Release of Federal Tax Lien” with the Los Angeles County Recorder. Plaintiff’s parents forwarded him a copy of the certificate. Plaintiff testified that his remaining distress and anxiety disappeared at this time. Shortly thereafter, plaintiff returned to the Los Angeles area.

PROCEDURAL HISTORY

I. Complaint

Plaintiff filed a four-count complaint against Capital One (ING’s successor in interest) and Integrated on March 13, 2018.⁷ In the first cause of action for negligent breach of trustee duties, plaintiff alleged that Integrated negligently breached its duties

⁶Plaintiff nevertheless pursued the bankruptcy. His dischargeable debts were discharged on March 8, 2016.

⁷Plaintiff also named as defendants Loretta Echols, an alleged agent of Integrated, and 30 Doe defendants. These defendants are not relevant here.

as a foreclosure trustee by (1) failing to take into consideration that plaintiff owed no debt to ING after the May 17, 2011 foreclosure sale, (2) making no effort to calculate his remaining debt after the foreclosure sale, and (3) failing to cancel his promissory note or provide him and ING with copies of the cancelled note. Plaintiff further alleged that if Integrated had taken these steps, he “would have immediately known that the ING cancellation of debt was erroneous,” “would have known he had no debt after May 17, 2011,” “would not have experienced said serious emotional distress, and instead would have dealt directly with ING challenging said Form 1099-C,” which ING “would have never issued.” Plaintiff alleged that he did not discover and could not reasonably have discovered the alleged breaches of duty until January 2018, when he received “an unsolicited letter from an attorney” “explaining the misconduct of ING and its misuse of said Form 1099-Cs.”

Plaintiff’s three other causes of action sounded against Capital One, ING’s successor in interest. In the second cause of action for negligent infliction of emotional distress, plaintiff alleged that ING “negligently and carelessly” calculated the alleged amount of forgiven debt, checked the box indicating that the loan was a recourse loan, and filed the Form 1099-C with the IRS, all with disregard that doing so exposed plaintiff “to the risk of paying taxes on . . . cancelled debt income.” In the third cause of action for fraudulent conduct, plaintiff alleged that ING made two intentional misrepresentations on the Form 1099-C: “(1) that on June 30, 2011, PLAINTIFF was personally liable for at least \$688,750.00 in principal debt; and (2) that ING had cancelled \$688,750.00 in principal debt on said date.” Plaintiff further alleged that ING “made said representations with the intent to

defraud PLAINTIFF, to induce him to accept said misrepresentations as true, and thus not challenge said purported cancellation of debt with the IRS or any other federal agency.” Plaintiff additionally alleged that ING “knew that PLAINTIFF would likely challenge said Form 1099-C upon its receipt and review,” and therefore either failed to mail to him or mailed it to an incorrect address. Plaintiff alleged that he reasonably relied upon and believed the misrepresentations when he received the Form 1099-C in October 2015, and “did not learn of the possible existence of said fraudulent Form 1099-C until January 2018.” Finally, in the fourth cause of action for intentional infliction of emotional distress, plaintiff alleged that ING engaged in “extreme and outrageous conduct” by issuing the Form 1099-C despite knowing at that time that plaintiff was not personally liable for any debt, that plaintiff had no debt to cancel on June 30, 2011, and “that the \$688,750.00 entered on said Form 1099-C had absolutely nothing to do with cancelled debt.” Plaintiff alleged that ING entered the false information “for ING’s own tax benefits.” Plaintiff sought recovery of economic damages, general damages for emotional distress, punitive damages, and costs of suit.

II. Summary Judgment

A. Motion and Briefing

In August 2019, defendants jointly filed a motion for summary judgment or, in the alternative, summary adjudication. They argued that summary judgment was appropriate because plaintiff “does not have a viable legal theory supporting his contention that the 1099-C should have reported \$0.00 in cancelled debt.” Defendants made two separate arguments in support of this position. First, they argued that IRS publications

(of which they requested judicial notice) did not require ING “to use the full credit bid when calculating cancelled debt.” Second, they contended that California’s antideficiency statutes⁸ “did not prevent ING from reporting debt cancelled by the foreclosure to the IRS.” Defendants further contended that summary judgment was warranted because the Form 1099-C at issue was a privileged communication and therefore could not “serve as the foundation of a fraud or negligence claim.”

Defendants raised several additional arguments in support of summary adjudication of each cause of action. With respect to the first cause of action, negligent breach of duty against Integrated, defendants argued that none of the authorities cited by plaintiff—Civil Code sections 2924k and 2941, and *Kerivan v. Title Insurance & Trust Co.* (1983) 147 Cal.App.3d 225—gave rise to the duties he claimed were breached. Defendants further contended that the cause of action was barred by the two-year statute of limitations applicable to negligence claims. Specifically, they argued that plaintiff’s claim accrued in October 2015 when he received the Form 1099-C from the IRS and suffered emotional distress.

Defendants raised similar arguments in support of the summary adjudication of the second and fourth cause of actions, negligent and intentional infliction of emotional distress by ING. They argued that ING did not owe plaintiff a duty of care in

⁸Antideficiency statutes “serve to prevent creditors in private sales from buying in at deflated prices and realizing double recoveries by holding debtors for large deficiencies” by prohibiting a creditor from seeking a deficiency judgment against a debtor after a non-judicial foreclosure. (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1236; see also Code of Civil Procedure, section 580d.)

preparing the Form 1099-C, that its conduct in preparing the Form 1099-C was not outrageous, and that plaintiff's claim was barred by the two-year statute of limitations. With respect to the third cause of action, fraudulent conduct, defendants argued that ING did not act with the requisite fraudulent intent to support the claim. They argued that ING used a valid method to calculate the cancelled debt it reported on the Form 1099-C, did not make any written or oral representations to plaintiff after issuing the Form 1099-C, and "had no way of knowing if the amount of cancelled debt stated in the 1099-C would constitute taxable income" for plaintiff, because it did not know his particular financial circumstances. Defendants further contended they were entitled to summary adjudication of plaintiff's claim for punitive damages.

Plaintiff opposed the motion. He argued that his debt was fully eliminated after the May 17, 2011 trustee's sale, and that the Form 1099-C was not a privileged communication. Plaintiff further disputed defendants' contentions that they did not owe him duties, did not engage in outrageous conduct, and did not act with fraudulent intent.⁹ Plaintiff additionally argued that his claims were timely, because "at no time between his receipt of the IRS copy of the 1099-C in October 2015 and his reading of his attorney's [solicitation] letter in early 2018, did Plaintiff ever *believe* that there was anything improper in the preparation of the 1099-C or the conduct of Integrated regarding the services it rendered as trustee; nor did he have any *reason to suspect*

⁹Plaintiff asserted that ING defrauded not only him, but also committed "a *massive tax fraud on the United States*" by using an improper formula to report cancelled debt and associated write-offs on its own federal tax returns.

wrongdoing.” Plaintiff asserted that his claims did not accrue until he had reason to suspect that defendants acted with negligence or malfeasance in preparing the Form 1099-C. Plaintiff requested judicial notice of several documents, including the Form 1099-C, the communications the IRS sent him, and ING’s financial statement.

Defendants filed a reply in support of the motion. They reiterated their earlier contentions and refuted the arguments plaintiff raised in his opposition. With respect to the statute of limitations, defendants contended that plaintiff knew the facts relevant to his claims in October 2015, but “[w]hat he lacked was knowledge of the legal principles that would transform the facts he knew into actionable claims.”

B. Hearing and Ruling

1. Tentative Ruling

In advance of the hearing on the motion, the court issued a tentative ruling granting in part both sides’ requests for judicial notice, and granting the motion for summary judgment. In the tentative, the court drew three legal conclusions that led it to grant summary judgment for defendants. First, the court concluded that “[f]or purposes of the 1099-C Form, the loan should have been characterized as nonrecourse because it was satisfied by way of non-judicial foreclosure.” Second, it determined that “[o]nly the unpaid principal balance at the time of the foreclosure sale should have been reported as a cancelled debt,” because “fair market value . . . is not relevant to the calculation of income realized” on a nonrecourse loan. Thus, by step two of its analysis, the court found that both the recourse notation and the amount of cancelled debt ING entered on the Form 1099-C were erroneous. At the third and final step of its

analysis, however, the court concluded that the erroneous information on the Form 1099-C “was more favorable to Plaintiff than that to which Plaintiff was entitled.” In the court’s view, ING should have entered the amount of its full credit bid, \$1,060,642.44, on the Form 1099-C, and that higher amount would have led the IRS to conclude that plaintiff owed even more taxes. “As such, Defendant’s apparent error on the Form 1099-C submitted to the IRS did not cause Plaintiff damage.”

The tentative ruling further observed that IRS Publication 4681, “Canceled Debts, Foreclosures, Repossessions, and Abandonments,” which the court judicially noticed, states that individual taxpayers “must report canceled debt as gross income” on their federal tax returns “[e]ven if you did not receive a Form 1099-C.” The court reasoned, “This means, Plaintiff had an independent obligation to ascertain (presumably with the assistance of a tax professional) the information reflected on the 1099-C. . . . The adverse impact upon Plaintiff arising from his failure to do so—and instead moving to Lima, Peru to avoid the reach of the IRS—falls upon him, not Defendants.” The court continued: “Indeed, had Plaintiff complied with this obligation to file a 2011 tax return he would have learned—as he admits he did—that as a result of an exemption, he had no tax liability for 2011. Needless to say, the damages Plaintiff suffered were self-inflicted as a result of his failure to comply with his obligations as a U.S. taxpayer.” The court further found that plaintiff could not recover damages for emotional distress, costs associated with his moves to and from Peru, or his costs associated with hiring the CPA. It concluded by finding that plaintiff “lacks standing to assert claims for fraud generally committed by Defendant against

the IRS in connection with taking excess deductions for charging off bad debt.”

2. Hearing and Ruling

The court heard the summary judgment motion on November 18, 2019, three days after it issued the tentative ruling.

Plaintiff’s counsel challenged the entirety of the court’s tentative ruling, contending that the court’s “legal analysis . . . was not presented in the motion for summary judgment, so I didn’t get to address it for Your Honor to consider.” He asserted, “There’s at least a dozen findings or rulings in the tentative that were never brought up by . . . the defendants, in the motion for summary judgment – that I never had an opportunity to address.” The court responded that it was “trying to just rely on the law,” and that plaintiff therefore was “not on all fours” with a case his counsel cited regarding due process and belatedly disclosed facts, *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (*San Diego Watercrafts*).

Defense counsel agreed with the court, adding, “it’s not a matter of new facts being sprung on the plaintiff here; it’s the court’s analysis of the legal concepts at play.” Defense counsel acknowledged that “[t]he court analyzed it differently, slightly differently, than defendants’ [*sic*] on the motion for summary judgment,” but contended that the court was “correct in your analysis,” which he argued did not prejudice plaintiff “whatsoever.”

Plaintiff’s counsel requested 10 days “to supply a response to your tentative, so I can go through the analysis, which I never had the opportunity with regard to opposing comments made by the court, which were not in the motion for summary judgment,

multiple issues, as well as some of them also may require additional evidence to address the issues raised by the court.” The court denied the request, explaining, “[i]t has nothing to do with facts or evidence. The court has judicially noticed, essentially, all of the facts I need to make my determination.” It then adopted the tentative as its final ruling over plaintiff’s objection.

The court entered judgment for defendants on December 4, 2019. Plaintiff timely appealed.

DISCUSSION

I. Standard of Review

“A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense.” (*Dix v. Live Nation Entertainment* (2020) 56 Cal.App.5th 590, 604.) If the defendant does not meet this burden, the motion must be denied without consideration of the opposing evidence submitted by the plaintiff. (*Id.* at p. 605.) If the defendant satisfies its initial burden, however, the burden then shifts to the plaintiff to present evidence demonstrating a triable issue of material fact. (*Ibid.*)

A motion for summary judgment is properly granted when “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (§ 437c, subd. (c).) We review a grant of summary judgment de novo, considering all of the evidence in the moving and opposing papers except that to which objections were sustained. (*Hampton v. County of San Diego*, *supra*, 62 Cal.4th at p. 347.) We presume the trial court overruled any evidentiary objections on which it did not expressly

rule. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) We liberally construe the evidence in favor of the party opposing the motion, and resolve any doubts in that party's favor. (*Hampton v. County of San Diego, supra*, 62 Cal.4th at p. 347.) We may affirm an order granting summary judgment if correct on any of the grounds asserted by the moving party in the trial court, regardless of the trial court's stated reasons, provided the parties have had an opportunity to brief the issue. (§ 437c, subd. (m)(2); *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.)

As with an appeal from any judgment, the appellant bears the burden of affirmatively demonstrating error on appeal. Thus, plaintiff must show the existence of triable issues by providing citation to the record and supporting authority. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.) Plaintiff likewise bears the burden of renewing any relevant evidentiary objections on appeal "by arguing the issue in [his] brief; citation to the record alone is insufficient." (*Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171, 183.)

II. The trial court should have given plaintiff an opportunity to respond to the tentative.

Plaintiff contends the trial court denied him due process of law when it denied his request for 10 additional days to respond to the tentative ruling. He again relies exclusively on *San Diego Watercrafts, supra* 102 Cal.App.4th 308 to support this argument.

In *San Diego Watercrafts*, the defendant moved for summary judgment and provided the court with evidence supporting the motion. After the plaintiff filed its opposing brief and evidence, the defendant submitted a supplemental

declaration containing new facts to rebut the evidence proffered by the plaintiff. The trial court considered the new facts over the plaintiff's objection and granted summary judgment. (*San Diego Watercrafts, supra*, 102 Cal.App.4th at pp. 311-312.) On appeal, the plaintiff argued that the trial court erred by considering the supplemental declaration. The appellate court agreed. (*Id.* at p. 312.) It held that when a trial court exercises its discretion to consider evidence not included in the defendant's separate statement at summary judgment, it "should also consider due process implications." (*Id.* at p. 316.) The appellate court further concluded that granting summary judgment based on evidence to which a plaintiff had no opportunity to respond was erroneous. "Here, the evidence not only was omitted from the separate statement, it also was not filed until after [the plaintiff] had responded to the issues raised in the separate statement. In considering this evidence, the court violated [the plaintiff's] due process rights. [The plaintiff] was not informed what issues it was to meet in order to oppose the motion. Where a remedy as drastic as summary judgment is involved, due process requires a party to be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*Ibid.*) The court then concluded that material issues of fact existed, and reversed the summary judgment. (*Id.* at pp. 316-317.)

The issue in *San Diego Watercrafts* differs from that presented here. In *San Diego Watercrafts*, the trial court granted summary judgment based on factual evidence the plaintiff had no opportunity to rebut. Here, the trial court considered facts and evidence that plaintiff had the opportunity to rebut, but granted summary judgment on a legal basis not argued by defendant.

“[T]he trial court has the inherent power to grant summary judgment on a ground not explicitly tendered by the moving party when the parties’ separate statements of material fact and the evidence in support thereof demonstrate the absence of a triable issue of material fact put in issue by the pleadings and negate the opponent’s claim as a matter of law.” (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 70.) “To require the trial court to close its eyes to an unmeritorious claim simply because the operative ground entitling the moving party to summary judgment was not specifically tendered by that party would elevate form over substance and would be inconsistent with the purpose of the summary judgment statute.” (*Id.* at p. 69.)

This distinction does not obviate the due process concerns raised here. “[W]hen the trial court grants a summary judgment motion on a ground of law not explicitly tendered by the moving party, due process of law requires that the party opposing the motion must be provided an opportunity to respond to the ground of law identified by the court and must be given a chance to show there is a triable issue of fact material to said ground of law.” (*Juge v. County of Sacramento, supra*, 12 Cal.App.4th at p. 70.) The trial court did not provide plaintiff with such an opportunity. This is not to say that the trial court was required to grant plaintiff’s specific request for 10 days; it did, however, have an obligation to afford him an adequate opportunity to address the legal grounds on which it based the ruling. (*Ibid.*; *Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684; *Cordova v. 21st Century Insurance Co.* (2005) 129 Cal.App.4th 89, 109-110.) The trial court erred in failing to do so.

Plaintiff makes no argument regarding the consequences of this error; he simply implies in his request for relief that it

renders the court's ruling reversible per se. "However, an appellant has the burden to show not only that the trial court erred but also that the error was prejudicial." (*Red Mountain, LLC v. Fallbrook Public Utility District* (2006) 143 Cal.App.4th 333, 347; see also Cal. Const., art. VI, § 13; § 475 ["No judgment, decision or decree shall be reversed or affected by reason of any error . . . unless it shall appear from the record that such error . . . was prejudicial . . . and that a different result would have been probable if such error. . . had not occurred or existed."].) We do not presume error is prejudicial (§ 475), and plaintiff has not carried his burden of showing that he was prejudiced here. As we next discuss, summary judgment was appropriate on grounds the parties had ample opportunity to brief, both here and in the trial court.

III. Summary judgment nevertheless was proper.

A. The causes of action for negligent breach of trustee duties and negligent and intentional infliction of emotional distress are time-barred.

In their motion for summary judgment, defendants argued that plaintiff's causes of action for breach of trustee's duties and negligent and intentional infliction of emotional distress were barred by the statute of limitations. Plaintiff responded to these arguments in his brief opposing summary judgment. Despite the trial court's failure to address the timeliness argument in its ruling, defendants contend on appeal that plaintiff's claims are time-barred and summary adjudication is warranted on that basis.

Plaintiff elected not to respond to this contention in his reply brief, "based on his interpretation of the law that . . . an appellate court will only consider issues considered and ruled

upon by the trial court.” This interpretation, for which plaintiff provides no authority, is erroneous. We may affirm an order granting summary judgment if correct on any of the grounds asserted by the moving party in the trial court, regardless of the trial court’s stated reasons, provided the parties have had an opportunity to brief the issue. (§ 437c, subd. (m)(2); *Garrett v. Howmedica Osteonics Corp.*, *supra*, 214 Cal.App.4th at p. 181.) We afforded plaintiff an additional opportunity to brief this and other issues by requesting supplemental briefing under section 437c, subdivision (m)(2).¹⁰ The timeliness of plaintiff’s claims accordingly is properly before us.

“A plaintiff must bring a claim within the limitations period after accrual of the cause of action.” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*.) All three of these causes of action are subject to a two-year statute of limitations. (§§ 335.1, 339.) Plaintiff thus had two years from the date(s) on which the causes of action accrued to file his complaint. A cause of action generally accrues “at ‘the time when the cause of action is complete with all of its elements.’” (*Fox, supra*, 35 Cal.4th at p. 806.)

An “important exception” to this general accrual rule is the “discovery rule,” which “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” (*Fox, supra*, 35 Cal.4th at p. 807.) “A plaintiff has

¹⁰ Section 437c, subdivision (m)(2) provides in relevant part, “Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs.”

reason to discover a cause of action when he or she ‘has reason at least to suspect a factual basis for its elements.’” (*Ibid.*) “[S]uspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period.” (*Ibid.*) For purposes of the discovery rule, the “elements” of a cause of action are construed generally and typically mean “wrongdoing, causation, and harm.” (*Ibid.*) “Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.” (*Ibid.*) Plaintiffs may not bury their heads in the sand; they are “required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” (*Id.* at p. 808.) Plaintiff bears the burden of pleading and proving entitlement to the discovery rule. (*Ibid.*)

With these principles in mind, we consider the timeliness of each cause of action.

1. Negligent Breach of Trustee Duties

Plaintiff alleged in his complaint that Integrated breached duties it owed him as trustee of the foreclosure sale. As plaintiff summarizes in his supplemental brief, his theory was that Integrated negligently (1) failed to determine that he no longer owed debt after the foreclosure sale, (2) failed to cancel his promissory note after the sale and provide him with a copy of the cancelled note, and (3) failed to notify him that he no longer no owed any debt to ING. Plaintiff alleged that the wrongdoing occurred “on May 17, 2011 and shortly thereafter.” He further alleged that the wrongdoing “was a legal and proximate cause” of

the “serious emotional distress” he experienced in October 2015, when he received the Form 1099-C. By virtue of these allegations, plaintiff’s cause of action for negligent breach of trustee duties accrued, at the very latest, in October 2015. His suit, filed in March 2018, was thus untimely on its face.

It is well-settled that a plaintiff must plead and prove the facts establishing his or her entitlement to the benefits of the discovery rule. (See *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1525; see also *Fox, supra*, 35 Cal.4th at p. 808 [“a plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’ [Citation.]”].) Plaintiff attempted to meet this burden at summary judgment by presenting a declaration in which he stated that he did not suspect wrongdoing by Integrated in October 2015 when he received the Form 1099-C. He further asserted that there was no basis upon which he should have suspected wrongdoing based on the information in the Form 1099-C.

At the summary judgment stage we must credit plaintiff’s testimony that he did not suspect wrongdoing. We are not similarly obligated to credit his assertion that nothing in the Form 1099-C should have prompted him to investigate the matter further. As noted above, “plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” (*Fox, supra*, 35 Cal.4th at p. 808.)

The Form 1099-C stated that plaintiff's debt, for which plaintiff had documentation, was a recourse loan. It further stated that the debt was cancelled on June 30, 2011, more than a month after the foreclosure sale date of which plaintiff was aware. Additionally, the Form 1099-C stated that the amount of debt cancelled was \$688,750.00, nearly \$200,000 less than the principal plaintiff knew that he owed on the loan. Finally, the Form 1099-C stated that the fair market value of the property was only \$255,000, which plaintiff believed was "low." Any one of these representations provided a basis for a reasonable person to inquire what had occurred at the foreclosure sale. Plaintiff did not come forward with any evidence that he conducted such an investigation, or explaining why he failed to diligently do so.

In his supplemental brief, plaintiff asserts that Integrated's liability "is premised upon California's antideficiency statutes terminating all debt at the time of the foreclosure sale, and Plaintiff had no knowledge of this fact until being so informed by his attorney in 2018, it is difficult to conceive of any reason why he *should have* had a suspicion of wrongdoing by Integrated." Plaintiff conflates facts with legal theories. "It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898.) "[I]t is the discovery of facts, not their legal significance, that starts the statute [of limitations]." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1113.) Plaintiff was aware, or could have become aware through reasonable investigation, of the facts underlying his cause of action for negligent breach of duty by October 2015. The cause of action accordingly is time-barred as a matter of law.

2. Negligent and Intentional Infliction of Emotional Distress

The analysis for these causes of action is virtually identical to that above. The allegations of plaintiff's complaint established that the causes of action accrued in October 2015 at the latest. Plaintiff alleged that ING knew that his debt was fully extinguished after the May 17, 2011 foreclosure sale, by virtue of both California's antideficiency laws and its full credit bid. ING nevertheless prepared and filed with the IRS a Form 1099-C that instead stated that it cancelled \$688,750.00 in debt on June 30, 2011. Plaintiff alleged that the filing of the Form 1099-C sometime between the May 17, 2011 foreclosure sale and the January 31, 2012 deadline for filing such forms was negligent or willful and outrageous conduct. Plaintiff further alleged that ING's filing of the form was the proximate cause of the severe emotional distress he began to suffer in October 2015. He alleged that he "did not discover nor reasonably could have discovered the breach of ING's duties until receipt of an unsolicited letter from an attorney in January 2018, explaining the misconduct of ING and its misuse of said Form 1099-Cs; and that at no time between October 2015 and January 2018, had PLAINTIFF read, heard or otherwise learned, of any information which would have led him to suspect any impropriety on the part of . . . ING."

When plaintiff received the Form 1099-C in October 2015, he was aware of enough facts to at least suspect that the information contained in the document was inaccurate. Plaintiff did not conduct any investigation into the matter, however. This is fatal to his attempt to apply the discovery rule.

In his opposition to defendants' motion and in his supplemental brief here, plaintiff points to a footnote in *Fox*,

supra, 35 Cal.4th at p. 808, fn. 2, which states, “[a]t common law, the term ‘injury’ as used in determining the date of accrual of a cause of action, ‘means both “a person’s physical condition *and* its ‘negligent cause.’” [Citations.] Thus, physical injury alone is often insufficient to trigger the statute of limitations.” This footnote does not assist plaintiff. “[C]ourts have rejected the argument that the limitations period does not begin to run until a plaintiff learns the specific causal mechanism by which he or she has been injured.” (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1298.) Plaintiff’s ignorance of the legal reasons why the Form 1099-C was inaccurate did not delay the accrual of his claims, when he was aware of inconsistent dates and numbers from the face of the form. The emotional distress causes of action are untimely.

B. The fraud cause of action is not supported by evidence of fraudulent intent.

Defendants did not assert that plaintiff’s cause of action for fraud was time-barred. They instead argued that the claim failed as a matter of law because plaintiff could not establish one or more of its elements.

“The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (*scienter*); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Defendants contended that ING lacked the intent to defraud, because it did not intend to make false representations to plaintiff or cause him harm, had no way of knowing whether the cancelled debt reported in the Form 1099-C would constitute taxable income to plaintiff, and made no written

or oral representations to plaintiff regarding the Form 1099-C. In support of their contentions, defendants submitted the declaration of Michael Meis, a senior manager at Capital One. Meis stated that “although ING knew that the 1099-C could have initiated an IRS investigation and resulted in IRS-imposed penalties or other sanctions if the IRS were to determine that Plaintiff withheld taxable income arising from the 1099-C, ING did not intend to make any misrepresentations to the Plaintiff or cause the Plaintiff any harm. ING relied on its Land Appraisal Report for the estimated fair market value used in calculating the cancelled debt. Further, ING did not know whether the amount of cancelled debt stated in the 1099-C would constitute taxable income to the Plaintiff because ING did not have the requisite knowledge of Plaintiff’s financial circumstances to make such a determination. ING issued the 1099-C solely because it believed that it was required to do so under federal tax law.”

Plaintiff responded to this argument and evidence by contending that defendants failed to carry their “initial burden of presenting evidence that ING did *not* have knowledge that its 1099-C misrepresentations were false.” He asserted that defendants “cannot overcome Plaintiff’s objections that Meis’ stated opinions lack proper foundation that he was ever in a position to acquire his purported knowledge.” Plaintiff further contended that, even if defendants did shift the burden to him, he produced evidence, largely in the form of admissions defendants made in response to requests for admission, that ING was aware that the representations in the Form 1099-C were false. Plaintiff urged the court to liberally construe this evidence.

The trial court did not address these contentions.¹¹ It also did not address plaintiff's evidentiary objections to the Meis declaration. We accordingly presume that the court overruled the objections, which plaintiff has not renewed through proper argument in his opening brief. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].)

Plaintiff is correct that defendants bore the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Defendants carried that burden with the Meis declaration, which disavowed any intent to defraud, the third element of the cause of action. The burden of production then shifted to plaintiff to make a prima facie showing of a triable issue of material fact. (*Ibid.*) Plaintiff produced several admissions showing that ING had knowledge that its representations in the Form 1099-C were false. This evidence spoke to the second element of the fraud cause of action, knowledge of falsity, rather than the third, intent to defraud. Plaintiff accordingly failed to carry his burden of demonstrating a triable issue of material fact as to the third element of the fraud

¹¹Evidently in response to plaintiff's suggestion in his opposition brief that ING committed "a massive tax fraud on the United States," the trial court held that plaintiff lacked standing to claim that ING defrauded the IRS by making misrepresentations on plaintiff's (and presumably others') Form 1099-C. The trial court did not, as plaintiff suggests, hold that he lacked standing to assert that ING defrauded him personally.

cause of action; the only evidence in the record pertaining to ING's intent is the Meis declaration.

Plaintiff asserts that "fraud may be inferred from all the evidence of the case," but provides no further guidance as to what inferences may be drawn from which evidence. Even liberally construed, plaintiff's evidence shows only that ING knew that the representations it made in the Form 1099-C were false. It does not establish that ING made the representations with the fraudulent intent plaintiff alleged, namely to "induce him to accept said misrepresentations as true, and thus not challenge said purported cancellation of debt with the IRS or any other federal agency." The claim accordingly fails as a matter of law; the trial court did not err in summarily adjudicating it.

DISPOSITION

The judgment of the trial court is affirmed. Defendants are entitled to recover their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.